STATE OF KANSAS

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August 4, 1975

ATTORNEY GENERAL OPINION NO. 75- 315

Mr. James H. DeCoursey, Jr.
Acting Secretary
Kansas Department of Economic Development
1st Floor - State Office Building
Topeka, Kansas 66612

Re: Public Improvements--Internal Improvements--Sewers

Synopsis: The State may not obligate state funds to match federal funds available through grants under the Public Works and Economic Development Act of 1965 and amendments thereto, for projects which constitute "internal improvements" which are prohibited under Art. 11, § 9 of the Kansas Constitution.

* * *

Dear Mr. DeCoursey:

You inquire concerning the expenditure of state funds to match federal basis and supplemental grants for local economic development public improvements. We understand that the federal program is implemented under the Public Works and Economic Development Act of 1965, and subsequent amendments thereto, Title 42 U.S.C.A. §§ 3121 *et seq*. A new EDA program requires matching state funds for federal funds made available for public work improvements in local EDA-eligible areas in Kansas. The matching funds required from the state are equal to twenty-five percent of the federal dollars allocated to the state. The sum of $106,000 having been allocated to Kansas, there has been appropriated $26,500 pursuant to ch. 18, § 27, L. 1975. The federal funds which must be matched may be disbursed, you advise, for specifically approved projects authorized for

> "public works, public service and development facility projects which directly or indirectly

> contribute to long-range economic growth or benefit long-term unemployed and members of low-income families in redevelopment areas and parts of economic development districts.
>
> "Public works, public service and development facility projects which provide immediate useful work to the unemployed and under-employed of the project area."

These criteria, we judge, are expressive of the objective criteria for projects specified in Title 42, U.S.C.A. § 3131, whereunder basic and supplementary grants are authorized for the acquisition or development of land and improvements for public works, public service, or development facility usage, and for other specified purposes within a redevelopment area if

> "(A) the project for which financial assistance is sought will directly or indirectly (i) tend to improve the opportunities, in the area where such project is or will be located, for the successful establishment or expansion of industrial or commercial plants or facilities, (ii) otherwise aid in the creation of additional long-term employment opportunities for such area, or (iii) primarily benefit the long-term unemployed and members of low-income families or otherwise substantially further the objectives of the Economic Opportunity Act of 1964;
> (B) the project for which a grant is requested will fulfill a pressing need of the area . . . ."

In addition, it is required that the area in which the project is undertaken have an approved overall economic development program, and in the case of a redevelopment area, that the project will provide immediate useful work to unemployed and underemployed persons in the area.

The first project proposed for funding is a sewer and street paving project in the Denton Industrial District in Arkansas City, Kansas. The development project entails the construction of 2,100 linear feet of secondary sewer laterals, and 4,300 linear feet of asphaltic street paving.

The question presented is whether participation by the state in this project is permitted by Art. 11, § 9 of the Kansas Constitution, which provides thus:

> "The state shall never be a party in carrying on any work of internal improvement except that: (1) It may adopt, construct, reconstruct and maintain a state system of highways, but no general property tax shall ever be laid nor general obligation bonds issued by the state for such highways; (2) it may be a party to flood control works and works for the conservation of development of water resources."

As originally adopted, the prohibition against internal improvements was absolute, with no exceptions for highways or water control and conservation. The Kansas Supreme Court spoke of the meaning of this prohibition thus in *Leavenworth County v. Miller*, 7 Kan. 479 (1871):

> "The state as a state is absolutely prohibited from engaging in any works of internal improvement. We will concede that this prohibition does not extend to the building of a state-house, penitentiary, state university, and such other public improvements as are used exclusively by and for the State, as a sovereign corporation: but it does extend to every other species of public improvement. It certainly extends to the construction of every species of public improvement which is used, or may be used, by the public generally. . . such as public roads, bridges, etc. . . . [I]t is prohibited from opening up or constructing any roads, highways, bridges, ferries, streets, sidewalks, pavements, wharfs, levees, drains, waterworks, gas-works, or the like . . . ." 7 Kan. at 493.

In *State ex rel. Boynton v. Atherton*, 139 Kan. 197, 30 P.2d 291 (1934), the court pointed out that Article 11, § 9 of the Kansas Constitution was drawn from the constitution of Wisconsin, and refers to *State ex rel. Jones v. Froelich*, 115 Wis. 32, 91 N.W. 115, 117, in which the validity of an appropriation to strengthen a levee system was called in question as an internal improvement and therefor unconstitutional. The court quotes from the case thus:

> "'In other cases the expression 'works of internal improvement' contained in constitutional prohibitions similar to ours, has been declared to include enterprises as follows: Dredging sand flats from a river (*Ryerson v. Utley*, 16 Mich. 269) deepening and straightening river (*Anderson v. Hill*, 54 Mich. 477, 20 N.W. 549); constructing or operating street railways (*Attorney-general v. Pingree*, 120 Mich. 550, 79 N.W. 814, 46 L.R.A. 407); telephone or telegraph lines (*Northwestern Tel Exch. Co. v. Chicago, M. & St. P. R. Co.*, 76 Minn. 334, 345, 79 N.W. 315); irrigation reservoirs (*In re Senate Resolution Relating to Appropriation of Moneys Belonging to Internal Impr. Fund*, 12 Colo. 287, 21 Pac. 484); roads, highways, bridges, ferries, streets, sidewalks, pavements, wharves, levees, drains, waterworks, gas works (*obiter, Leavenworth Co. v. Miller*, 7 Kan. 479, 493, 12 Am. Rep. 425); levees (*Alcorn v. Hamer*, 38 Miss. 652); improvement of Fox river (*Sloan v. State*, 51 Wis. 623, 632, 8 N.W. 393); levees and drains (*State v. Hastings*, 11 Wis. 448, 453).'"

The dictum in *Leavenworth County v. Miller*, 7 Kan. 479 (1871), that roads and highways constitute internal improvement was borne out in the holding of *State ex rel. Brewster v. Knapp*, 99 Kan. 852 (1917), in which the court held invalid an appropriation for the building of county roads, under the forerunner of the present Art. 11, § 9, in which the prohibition against internal improvements was absolute. The court there adverted to 4 *Words and Phrases*, p. 3718 *et seq.*, in which it found that the term "internal improvement" had been held to include a wagon bridge across the Platte river, public bridges, a water grist mill, an irrigation system, a petroleum pipe line, water power, and roads and highways.

If, of course, the prohibition against internal improvement extends to roads and highways, it extends, similarly, to streets, and part of the project in question involves the construction of a street. So long, however, as the street is part of the "state system of highways" as that phrase is used in Art. 11, § 9, expenditure of state funds for this part of the project is not prohibited.

A more technical and difficult question arises from the inclusion of sanitary sewer construction in the project. The sewer is obviously an "improvement." The question arises whether it is a "public improvement," to which the state may be a party, or an "internal improvement," to which the state may not be a party. The distinction between the two was observed in *State ex rel. Boynton v. State Highway Commission, supra:*

> "The term 'public improvements,' as used in section 5, meant public buildings which the state should need in carrying on its functions, such as the statehouse, state penal, educational and eleemosynary institutions (Wyandotte Constitutional Convention, p. 327), while the term 'internal improvements,' used in section 8, applied to turnpikes, canals and the like." 138 Kan. at 919.

Thus, student dormitories are "public improvements," and not "internal improvements." *State ex rel. Fatzer v. Board of Regents*, 167 Kan. 587, 207 P.2d 373 (1949). The term "public improvement" describes, basically, improvements to property owned and used by the state in the discharge of its duties and responsibilities as a sovereign corporation, and is restricted to state buildings and improvements associated therewith. The sewer improvement in question is not to be made on or for the benefit of state property, or to enable any particular state governmental agency to carry out its responsibilities. Projects undertaken for the improvement of the state's own property generally may be deemed to be public improvement. For example, a drainage control project for improvement of property of the Forestry, Fish and Game Commission might well be deemed a public improvement, see *State ex rel. Boynton v. Atherton, supra* at 209, while a drainage or flood control project for the general benefit of a river valley region would be a work of internal improvement, see *State ex rel. Brewster v. Knapp, supra* at 857.

The prohibition against "internal improvements" has not been eroded or qualified by construction and interpretation. As the cited cases make clear, the phrase has been broadly construed to assure the effectiveness of the prohibition.

We recognize the salutary purposes of the Public Works and Economic Development Act of 1965 and its amendments, and of state participation through matching funds. However, expediency is a poor ground for restricting the constitution. There was much support for projects during the Great Depression. As the Kansas Supreme Court stated in *State ex rel. Boynton v. Atherton, supra*, in 1934:

> "The present severe and long-protracted economic depression calls for large drafts of legislative power for the relief of the poor, and this desideratum our constitution generously sanctions and encourages; but economic distress is not justification for ignoring the constitution itself." 139 Kan. at 210.

In this jurisdiction, the Kansas Supreme Court has been strictly faithful to the purpose and intent of the drafters of the Constitution, and in no case has it qualified the term "internal improvement." In *Yesler v. City of Seattle*, 1 Wash. 1015, 25 Pac. 1014 (1890), it was objected that the title of a legislative act, authorizing "cities and towns to construct internal improvements," did not fairly describe the body of the act, which referred to waterworks, sewers and artificial light plants. The court stated thus:

> "Perhaps this is an original use of the term 'internal improvements.' It has certainly not been commonly applied to the improvements supposed to be made by cities for the benefit of their inhabitants, but has been employed more grandiloquently in reference to the improvement of highways and channels of travel and commerce in the statutes of congress and the state legislatures. And yet when under it our legislature particularizes water-works, sewers, and light plants, which certainly are in fact internal improvements relatively to the cities of the state, we do not deem the verbal criticism of sufficient weight to set aside the act." 25 Pac. at 1015.

In this state, the term has not been restricted to highways and channels of commerce. In *State ex rel. Coleman v. Kelly*, 71 Kan. 811, 81 Pac. 450 (1905), the court held that a proposed oil refinery authorized by legislation constituted an "internal improvement;" in addition, the court regarded the prohibition as expressive of a public policy, given constitutional embodiment, against entry by the state as a competitor of private enterprise in all lines of trade and commerce. Thus, for example, serious constitutional questions attend proposals for legislation authorizing state-owned resorts, which are commonly urged as a means to encourage particular commerce and economic growth in the state.

We cannot but conclude that the proposed sewer construction constitutes an "internal improvement" to which the state may not be a party. We understand that the itemized cost estimates of the project total $34,060, of which twenty-five percent, the matching responsibility of the state, would be approximately $7,000. The amount involved is indeed small. The relatively slight obligation of the state does not justify disregard of the constitutional prohibition, however. So far as we are advised, the project is

supported by all concerned, and indeed, the eligibility of the state to participate in various EDA projects in the future may be of much benefit to affected eligible areas and communities of the state. However, as the court observed in *State ex rel. Boynton v. Atherton, supra*, the idea [that 'What's the constitution between friends?']. . . has not heretofore been put forward to justify an act of the legislature when its constitutionality has been called in question . . . ." 139 Kan. at 209-210.

The question remains whether the state is indeed a "party" to the proposed project. We can conceive of no more meaningful manner in which the state may be deemed to be a party to an undertaking than that it appropriates and obligates funds therefor. It is important to point out that there is no question involved here of the constitutionality of any state statute. The sole question is whether funds appropriated from the state general fund by ch. 18, § 27, L. 1975 for "matching public works and economic development grants" may be expended for projects which constitute "internal improvements" within the meaning of art. 11, § 9 of the Kansas Constitution. Clearly, they may not.

Yours very truly,

Curt Schneider

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